(17)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 333

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR,

Petitioner,

vs.

JUANITA A. GALLIEN, ET ALS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Of Counsel.

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Petitioner,

vs.

JUANITA A. GALLIEN, ET ALS.

A. PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Honorable, the Supreme Court of the United States:

Your petitioner, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor (Appellant in the Court below), respectfully presents:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review the decisions and decrees made and entered in said Circuit Court of Appeals on April 29th, 1942 and May 30th, 1942, respectively (Circuit Judges Foster, Holmes and Sibley sitting), by which a judgment of the United

States District Court for the Lake Charles Division of the Western District of Louisiana (Ben C. Dawkins, J., sitting —without jury) was affirmed.

This action was originally brought, on December 18th, 1939, in the District Court for the Fourteenth Judicial District, Parish of Calcasieu, State of Louisiana (No. 20,372). On January 2nd, 1940 an order of removal was timely signed by the Judge of that State Court and the transcript promptly filed on that date in the proper Federal Court for that District and Division (No. 222), where, after preliminary proceedings, now of no concern, issue was joined and the case tried on its merits beginning January 13th, 1941; resulting in judgment, entered on June 25th, 1941, for those Plaintiffs-Appellees in the Circuit Court and Respondents here, awarding them money damages in the full sum prayed for $15,000.00 (R. 412).

I. Statement.

This application for certiorari would not be here at all were there presented by this Record only the dissatisfaction of an unsuccessful litigant in this personal injury damage suit; nor if there is involved only issues of fact twice adversely considered and determined below; nor if the issues tendered hereby involved questions turning upon weight, credibility or sufficiency of testimony.

While this litigation does involve a personal injury damage suit, the reason prompting this application is that Petitioner, a Trustee in the Reorganization of a Railroad under the Bankruptcy Act, sincerely feels and earnestly asserts that he has been deprived of and denied that fair, just and impartial consideration and review on appeal of both the facts, clearly and demonstrably established by this record, and the settled law of Louisiana properly applicable thereto, as is contemplated, required and intended

by the law and Rule 52(a) of the Rules of Federal Procedure in Civil Actions. This both Courts did without the citation of or reference to a single authority—none supporting exist.

That the Judge of the District Court erroneously found the facts and misapplied the law of Louisiana to even such manifestly erroneous findings is obvious to any impartial consideration of the evidence and the jurisprudence of Louisiana. It is likewise apparent that the remarkable and extraordinary treatment accorded this record by the Circuit Court of Appeals for the Fifth Circuit is an equivalent to an evasion, if not an avoidance of that review on appeal, guaranteed to Petition by the law and Rule 52(a) of the Federal Rules of Procedure in Civil Actions.

Unless Petitioner may, hereby, obtain relief at the hands of this Court, not only will a great and manifest injustice have been effected under the guise of judicial process, but the duty and obligation of the Circuit Court of Appeals to itself review the facts erroneously found by a Trial Judge (without Jury) and to correct obvious errors of law, will have been permitted, if not approved. If so, hereafter, all that any intermediary appellate-federal court will have to do in order to evade a reconsideration of erroneously found facts and misconstrued or misapplied law will be to, instead of refusing to review as was first done here, accomplish the same result with the generality "not clearly erroneous"—though demonstrably otherwise—and a litigant becomes helpless to correct manifest error.

This Petitioner, therefore, not only seeks the review here of which he was deprived below, but, alternatively, if that attention of this high tribunal be not afforded him, that the erroneous judgment be here reversed for want of proper consideration below and the cause remanded with appropriate instructions to the Circuit Court of Appeals

to themselves give to Petitioner that review and reconsideration which the Rules of Procedure and the law contemplate he shall have and provide that he is entitled to.

The issues involved, factual and legal, and the manner of their mishandling below are fully disclosed in this application, its supporting brief and the exhibits attached to it.

II. The Admittedly Erroneous Decision of the Fifth Circuit Court and Its Improper, Unauthorized, Erroneous and Extraordinary Failure to Review This Record of a Trial of a Civil Action by a District Judge Without a Jury.

The action was tried by the District Judge, without a Jury, and on regular and proper appeal had to the Circuit Court of Appeals for the Fifth Circuit (No. 10,095), after submission upon oral argument and brief, a written decree and opinion was entered, dated April 29th, 1942, wherein that Honorable Court (Holmes, J.) not only misconstrued and misapplied the law to the facts as found by the District Judge, but declined and flatly refused to review said patently, obviously and demonstrably erroneous factual findings, upon the clearly erroneous conclusion thusly stated in said written opinion:

> "This was the substance of the testimony of the two surviving occupants of the car, and it was corroborated in part by other witnesses, none of whom was impeached. Defense witnesses offered contradictory testimony, but the conflict was resolved in favor of the appellees by the trial court, *and its findings are not subject to review by this Court.*"

Upon application for rehearing it was conclusively and authoritatively demonstrated that such ruling of the Honorable Circuit Court of Appeals that the findings of fact by the District Judge, who tried the case without a

jury, were not subject to review by the Circuit Court (because the Plaintiffs' witnesses were not impeached—the only reason stated) was manifest error.

Thereupon, instead of granting the rehearing—as obviously should have been done, under the circumstances—and themselves reviewing and finding the facts, so manifestly and demonstrably erroneously found by the District Judge—the Circuit Court of Appeals, by Order entered on May 30th, 1942, literally covered up its obvious mistake by directing that their erroneous conclusion (above quoted) be altered, be stricken from their original written opinion entered and printed, and that, in lieu thereof, same be changed so as to substitute for their erroneous ruling that such findings were "not subject to review" a ruling that same "are not clearly erroneous"—which, in truth and in fact, they demonstrably are!

As thus changed, the Court's decree, the new verbage being actually pasted over the original, reads as follows:

> "This was the substance of the testimony of the two surviving occupants of the car, and it was corroborated in part by other witnesses, none of whom was impeached. Defense witnesses offered contradictory testimony, but the conflict was resolved in favor of Appellees by the trial Judge, who tried the case without a jury, and his findings in this respect are not clearly erroneous."

Petitioner respectfully but emphatically asserts, with the utmost sincerity and conviction, that:

(a) The facts found by the District Judge are not only "clearly" but "demonstrably" erroneous;

(b) That Petitioner was entitled to a rehearing, since the original opinion of the Circuit Court was—now admittedly—erroneous upon substantial, material and conclusive issue;

(c) That, under these circumstances, Petitioner is entitled to even here and now, and the ends of justice require a review, reconsideration and factual finding by this Honorable and August Tribunal, or, at least, to a remand of this cause with instructions to the Circuit Court of Appeals to themselves review, reconsider and find the facts of this cause, in accordance with the evidence.

(d) That it is manifest error, unjust and unfair, for the Circuit Court of Appeals for the Fifth Circuit to have thus "side-stepped" the demonstrably erroneous factual findings of the District Court and, after a formal written opinion is filed and entered and admittedly erroneous rulings were demonstrated in an application for rehearing, to have, thus, stricken its obvious error and corrected same by achieving the same unjust result with a blanked affirmation, without assigning reason, discussing the factual points raised, or otherwise resolving the rightful issues properly, fully and convincingly presented by the record.

(e) That to permit Circuit Courts of Appeal to thus dispose of factual issues, makes a mere sham of Rule 52(a) of the New Rules of Federal Procedure in Civil Actions.

III. Erroneous and Unauthorized Alteration of the Record by the Fifth Circuit Court of Appeals.

Petitioner shows that it was clear error and highly prejudicial to petitioner for the Court of Appeals, when application for rehearing demonstrated manifest error in a substantial, material and not merely informal or clerical matter, to itself alter the record by literally eradicating its admitted error from this record under guise of an amendment, change its opinion and decree in the record, and, thereafter, refuse petitioner any rehearing or the reconsideration and review to which he was entitled under the law and Rules of Federal Procedure in Civil Actions

(Rule 52(a)). Nor was the mistaken ruling of the Circuit Court of Appeals, thus by it changed, mere harmless error, within the meaning and contemplation of Rule 61 of the New Federal Rules or a mere technical unprejudicial defect within the purview of R. S. Section 726; Jud. Code, Section 269; 28 U. S. C. A. Section 391. It is obvious that in fact and effect and under the law, same was quite the contrary.

IV. Erroneous Construction and Application of the Law of Louisiana.

(a) In its original opinion—unaltered in its final opinion, after alteration thereof—the Circuit Court of Appeals erroneously applied—as had the District Judge—the law of Louisiana, even to the facts as erroneously so found.

This action was brought upon the theory and allegation (R. 4-5; Plaintiffs' Petition, pp. XIII, XIV) that the automobile in which that plaintiffs' decedent was riding "side-swiped" or ran into the side or corner of the end of an unlighted box car standing on a switch-track which ran parallel to a paved street in the City of Lake Charles, Louisiana:

> "* * * said freight car at the time of the accident extending ten (10) to twelve (12) inches over the paved portion of the highway. * * * defendant and its employees negligently failed to place warning signs or lights on these parked freight cars despite the fact that they extend over the highway * * * Defendant's negligence as above set out, was the proximate cause of the accident * * *"

The testimony was conclusive, uncontradicted and uniform that, in fact, the automobile was driven clear off the paved city street and onto the railroad track, which constituted no part thereof, one hundred (100) to one hundred and fifty (150) feet before reaching the standing box car (which neither the driver (a witness) nor any occupant

saw at all) and was driven headlong into the end of the stationary freight car; that the railroad track was on its own embankment, which formed no part of the street.

Under those undenied and undeniable facts, both the District Judge and Circuit Court of Appeals applied the rule that it constitutes negligence to leave an unlighted automobile parked upon the paved portion of a highway or upon its shoulder! That rule of law is statutory in Louisiana and has no application whatever to municipal streets or railroad tracks constructed upon the railroad's own property paralleling said street—or even highway.

To support that legal conclusion of the Court of Appeals and the District Judge and that law as by both applied, to even the instant facts as erroneously so found, there exists in Louisiana, in the Federal Jurisprudence or elsewhere, no authority whatever; and none is cited by either Court.

(b) The written opinion of the Circuit Court of Appeals, dated and entered April 29th, 1942, devotes five (5) of its six and one-half (6½) pages to the determination of a preliminary procedural issue, which was frankly abandoned upon oral argument because of an intervening state decision reversing the prior state decision upon which that technical point had been predicated.

The point referred to had to do with whether this action brought against the Bankruptcy Trustee only after lapse of the prescriptive period had prescribed under the laws of Louisiana, or whether a previous suit in the State Court by the same Plaintiffs upon the same cause of action brought against the Corporate Debtor only sufficed to toll the running of that prescriptive period of one (1) year.

Since the point is not an issue here, it seems sufficient to say that the point, admittedly highly technical throughout, was predicated upon the distinction between the one year prescriptive period under Article 2315 of the Civil

Code of Louisiana being a limitation upon the right rather than a preemption of the remedy. This petitioner's original contention thereasto was based squarely upon a Louisiana decision (*Matthews* v. *Kansas City Southern Ry.* (Mch. 12th, 1929), 10 La. App. 382, 120 So. 907), which had admittedly been subsequently overruled by *Mitchell* v. *Sklar* (May 27th, 1940), 196 So. 392.

The changed situation of the Louisiana jurisprudence was frankly acknowledged to the Circuit Court and the point abandoned, yet, that Court largely expended its decision in ruling upon the point and brushed aside the real issue by erroneously holding that the factual findings of the District Court, solely, vigorously and demonstrably shown to be erroneous, were "not subject to review" on appeal. Then, as above stated, when that ruling was demonstrated on rehearing application to be unsound in law, the Circuit Court, without granting rehearing, changed their original opinion and *actually pasted over* their filed and entered opinion the revised ruling that the District Court's findings were "not clearly erroneous", so that, unless the relief sought by this petition is allowed, a considerable and manifest injustice will be effected and petitioner will be thus unfairly and unjustly deprived of any remedy therefrom.

(c) Notwithstanding the uncontradicted proof and the *admission of the driver* that he drove clear off the paved street and onto the railroad track long before he reached or saw the box car, and *far enough away to have stopped,* and into the end of which he crashed headlong, the Court of Appeals erroneously held that the overhang of the side of the box car, a few inches over the pavement, was, as alleged by respondent, the proximate cause of this collision, which it obviously was not; and that but for the absence of a light upon the unseen box car the accident would not have happened, when the driver *admitted he was completely*

blinded by the headlights of an approaching automobile and *could see nothing* at all. The Court below ignored altogether the settled law of Louisiana that it is the *duty of the driver of an automobile driven off the pavement to stop immediately;* that it is *fatal contributory negligence* for one to travel by automobile while intoxicated or, even more so, of himself sober with an intoxicated driver—as to all of which matters this record is either clear and uncontradicted or practically so.

V. Certified Copy of Original Opinion of the Circuit Court of Appeals for the Fifth Circuit—Before Alteration.

Since the certified transcript and record furnished Petitioner under the rule for filing here, contains only *the altered opinion* of the Circuit Court and *not their original opinion,* Petitioner attaches hereto, as an exhibit and part hereof, a certified copy thereof.

VI. Prayer for Certiorari and Review or Alternative Relief.

Wherefore, Petitioner, referring to the attached brief in support of the foregoing reasons for review, respectfully prays that this Court issue a writ of Certiorari directed to the United States Circuit Court of Appeals for the Fifth Circuit, to certify and send to this Court a full and complete transcript of the record herein, bearing that Court of Appeals' Docket No. 10,095, to the end that the said case may be reviewed and determined by this Court as provided by law, and that the decisions of the Circuit Court of Appeals, dated April 29th and May 30th, 1942, may be reversed and judgment here entered in favor of this Petitioner and against said Respondents, rejecting their demands and dismissing their action at their cost, or, *alternatively,* that the said judgments of said Circuit Court of Appeals entered herein in this cause be, by this Court, re-

manded to said Circuit Court of Appeals for the Fifth Circuit, with instructions to grant a Rehearing herein and, thereupon, to hear, review, reconsider and themselves correctly determine the issues of law and of fact, heretofore properly raised and presented by this record.

Petitioner respectfully prays for such other and further relief in the premises as to this Court may seem meet, just and proper.

GUY A. THOMPSON, Trustee,
Missouri Pacific Railroad Company,
Debtor (Applicant), *Petitioner,*
By FRED. G. HUDSON, JR.,
Monroe, Louisiana;
THOS. F. PORTER,
Lake Charles, Louisiana,
Attorneys for Petitioner.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 10095.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, Appellant,

versus

JUANITA A. GALLIEN, et al., Appellees.

Appeal from the District Court of the United States for the Western District of Louisiana.

(April 29, 1942.)

Before Foster, Sibley, and Holmes, Circuit Judges.

HOLMES, Circuit Judge:

Oneal Gallien was fatally injured when the automobile, in which he was riding as a guest, collided with a freight car used by the appellant as reorganization trustee of the Missouri Pacific Railroad Company. This suit was brought by the minor children of the deceased, through their legal representatives, to recover damages from the appellant for the alleged wrongful death of their father. The cause was submitted to the court without a jury, and resulted in a judgment for the appellees, from which the trustee has appealed.

It is contended that the action should have been dismissed because jurisdiction over the person of the defendant therein was never properly acquired; and because the suit was filed more than one year after the death of the deceased, and at a time when the cause of action was extinguished by statutory peremption and the remedy barred by statutory prescription. The accident occurred shortly

before dawn on August 7, 1938, and Gallien died two days later. Within one year thereafter, suit was filed by the appellees against the Missouri Pacific Railroad Company. In that suit attempts were made, more than one year after the cause of action accrued, to join the trustee as a party defendant; but a valid service of process was never had upon him, and the suit was dismissed.

On December 18, 1939, appellees filed this suit in a state court of Louisiana against the trustee, and the process issued for the trustee was served upon the Secretary of State of Louisiana. The cause was removed to the Federal court, and a motion to dismiss was filed on the ground that the service of process upon the Secretary of State was illegal and no jurisdiction over the person of the defendant was thereby obtained. On April 22, 1940, appellees, in an *ex parte* proceeding, were granted leave to file a supplemental petition praying service of process upon the person who had just been designated by the trustee as his resident agent for the service of process. The trustee then filed a supplemental motion to dismiss, contending that the *ex parte* order was untimely, improper, and irregular, and that the complaint showed on its face that it was barred by the statute of limitations. Both motions to dismiss were overruled.

If the *ex parte* order was proper, the valid service of process upon the trustee thereunder conferred jurisdiction upon the court below over the person of the trustee. Appellant's brief contains no argument or citation of authority in support of its attack upon the order, and we find no merit in his contentions in regard thereto. When the order was granted, the appellant had entered his appearance solely for the purpose of contesting the jurisdiction of the court on the ground that he had not been validly served with process. If that appearance was general for all purposes, or if jurisdiction as to his person had been

acquired by the service upon the Secretary of State, no prejudice resulted to him from the later proceedings undertaken to acquire that which already was had. If his appearance was special only, and if the prior service was void, then appellant was not then a party to the suit, and the proceedings could not have been other than *ex parte*.

The service of process is a step essential to the exercise of jurisdiction by a court. If the court had jurisdiction of the subject matter of the suit, it was its proper function to issue its process, repeatedly and in various forms if need be, to compel any one within the bounds of its jurisdiction to submit thereto. Therefore, unless the cause of action sued upon had ceased to exist by virtue of peremption or had become barred by prescription, the motions to dismiss properly were overruled.

Article 2315 of the Louisiana Civil Code, under which this action was brought, vests a right of action in the surviving children of the deceased, in cases of wrongful death, for the space of one year from the death. This suit was not brought within the one-year period, but it is claimed that the filing of the original suit against the railroad company operated to toll the running of the statute with the result that this suit was filed within the required period.

Act 39 of the Louisiana Legislature of 1932 provides that the filing of a suit in a court of competent jurisdiction shall interrupt all prescriptions affecting the cause of action therein sued upon against all defendants. Although the limitation imposed by Article 2315 has been held to be peremptive rather than prescriptive,[1] the courts of the state in several instances have held the limitation to be interrupted in cases of peremption and prescription alike, under circumstances and in language indicating that the filing of suit interrupts the running of the limitation without regard

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[1] Matthews v. Kansas City Southern R. Co., 120 So. 907; Mitchell v. Sklar, 196 So. 392. But see 9 Tulane Law Review, 285.

to whether it is peremptive or prescriptive.[2] Moreover, Act 39 relates to "prescriptions affecting the cause of action." Since peremption affects the cause of action and prescription only affects the remedy, it may well be that the legislature intended by this Act to apply the same principle of law to peremptions that the courts long had been applying to prescriptions, thereby erasing any distinction between them in this regard.

Whether the suit brought against the railroad company operated to interrupt the running of the statute as to the suit now before us, therefore, turns upon whether there was sufficient identity between the parties defendant in the respective suits to make it plain that the appellant was reasonably put on notice, prior to the elapse of a year after the occurrence of the event giving rise to the suit, that the adverse parties intended to attempt to enforce whatever cause of action they might have by reason thereof.[3] The suits here involved were brought by the same plaintiffs upon the same cause of action, the difference being that the first was against the railroad company and the second against the trustee who stood in the shoes of the corporate debtor by virtue of appointment under the Bankruptcy Act.

In the case of *Vernon v. I. C. R. Co.*, 97 So. 493, the Supreme Court of Louisiana held that a suit by Mrs. Vernon against the railroad company for damages for the wrongful death of her son, in which service was obtained upon the Director General of Railroads, had the effect of interrupting the prescription as to a later suit by the same plaintiff upon the same cause of action against the Director

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[2] Brandon v. Kansas City Southern Ry. Co., 7 Fed. Supp. 1008; Blume v. City of New Orleans, 104 La. 345, 29 So. 106; Smith v. Monroe Grocery Co., 154 La. 370, 97 So. 493; Myers v. Gulf Public Service Corp., 15 L. App. 589; Mitchell v. Sklar, 196 So. 392.

[3] Vernon v. Illinois Central R. Co., 97 So. 493; Callendar v. Marks, 171 So. 86; Norwich Union Indemnity Co. v. Judlin & Whitmire, 7 La. App. 379; Flower v. O'Connor, 17 La. 219.

General. In *Succession of Saunders,* 37 La. Ann. 772, it was held that a suit against a person in his individual capacity interrupted prescription in regard to the suit of the same plaintiff upon the same cause of action brought against that person in his representative capacity. Cf. also *Brandon v. Kansas City Southern Ry. Co.,* 7 Fed. Supp. 1008.

It is not contended that the trustee had no notice of the suit against the corporate debtor. The same attorney represented both the railroad and the trustee, and conducted negotiations with reference to the suit against the railroad prior to the expiration of the period of limitation and at a time when all authority to proceed with suits by and against the corporation was vested by the Bankruptcy Act in the trustee.[4] Under these circumstances we think appellant had such notice as was required by the law of Louisiana, and that this suit was neither perempted nor prescribed by the limitation contained in Article 2315 of the Louisiana Civil Code.[5]

On the merits appellant contends that his motion for an involuntary dismissal should have been sustained because the evidence failed to show that he was guilty of any negligence, and because it was clearly proved that the decedent was guilty of contributory negligence. It is also asserted that many of the facts found by the trial court, which contributed to its judgment, were wholly unsupported by the evidence.

The evidence for the plaintiff below may be briefly summarized. The deceased, his brother, and a young lady left the Paradise Inn in Lake Charles, Louisiana, about four o'clock on the morning of August 7, 1938, to drive to Beau-

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[4] 11 U. S. C. A., Sec. 205 (c) (2).

[5] Vernon v. Illinois Central R. Co., 97 So. 493; Mitchell v. Sklar, 196 So. 392; Brandon v. Kansas City Southern Ry. Co., 7 Fed. Supp. 1008; Act 39 of the Louisiana Legislature of 1932.

mont, Texas, whence they had come earlier in the evening. They were travelling in a coupe, with the brother driving, the lady in the middle, and the deceased seated at her right, when they passed down Front Street in Lake Charles. This was a wide, paved street alongside which ran a railroad track owned by appellant, upon which there was parked a freight car. The track was close to the pavement, and the side of the freight car extended over the pavement several inches.

As the automobile proceeded along the street at a legal rate of speed, the driver suddenly was blinded by the lights of an approaching automobile. He turned abruptly to the right and partially off the pavement to avoid a collision, being unaware of the presence of the freight car. No one was able to see the box car until it loomed up in the darkness only ten feet in front of the automobile. The brakes were promptly applied, but it was too late, and the right side of the car crashed into the left side of the box car. The deceased was asleep until the very moment of impact, and he sustained injuries that caused his death. None of the occupants of the car was intoxicated, and the driver had drunk nothing except a bottle of beer four hours earlier.

This was the substance of the testimony of the two surviving occupants of the car, and it was corroborated in part by other witnesses, none of whom was impeached. Defense witnesses offered contradictory testimony, but the conflict was resolved in favor of the appellees by the trial court, and its findings thereon are not subject to review by this court.

The railroad company had a lawful right, under a written agreement with the City, to maintain the track and operate its trains thereon, but it had no right to park its freight car alongside the highway at night without taking precautions to warn the public of its presence. The hazard attendant to parking any vehicle upon or adjacent to a high-

way at night without lights or other warning has long been recognized, and appellant was guilty of negligence but for which the accident would not have occurred. Under the findings made by the trial court, no contributory negligence could be imputed to the decedent.

We find no reversible error in the record, and the judgment is Affirmed.

A True copy. Teste:

OAKLEY F. DODD,
[SEAL.] *Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.*

B. Summary Statement of the Issues Involved.

(1) *Nature of the Action.*

This suit was filed by and on behalf of the children of decedent (a middle aged man), who was fatally injured about daybreak, when an automobile being driven by decedent's brother and in which decedent and a young night-club waitress were occupants, was driven from off the paved street in Lake Charles, Louisiana, onto a paralleling railroad industrial switch track, and headlong into the end of a freight car standing thereon.

The theory of the suit was that the automobile sideswiped a portion of the side of the railroad car, which extended over the paved street a few inches, which constituted the negligence alleged upon.

On trial by a Judge, without Jury, the *undisputed evidence* showed that the automobile had not sideswiped the railroad car (which none of its occupants ever saw at all), but had left the pavement and gone onto the railroad track a sufficient distance before that car was reached to have been stopped, that the parties were drunk, etc.

Disregarding completely the evidence, even admissions and misapplying local state law and settled jurisprudence

contrary to the vast weight of authority, both Courts below awarded a judgment in substantial damages—$15,000.00.

In addition, this record presents a substantial question of practice and procedure required in the ends of justice, supervision and settlement by this Court, as hereafter fully presented.

(2) *The Specific Questions Presented.*

This application for certiorari is, therefore, based upon the following grounds:

(a) There is, in truth, no accord between the Circuit Court of Appeals and the District Court as to the facts found by the District Judge, because *the Appellate Court made no such findings* and gave but scant, if any, consideration thereto, under the extraordinary circumstances and procedure hereafter detailed.

(b) The Circuit Court of Appeals committed gross and manifest error, in *refusing petitioner a rehearing* and in *failing to itself consider, review and find the facts* in accordance with the evidence, and, without rehearing, in *altering the record,* and changing its original opinion and decree so as to *physically delete* therefrom the obviously and admittedly error it had made in ruling that, under the law, the facts found by a District Judge, who tried the case without a jury, were "not" subject to review in that Appellate Court.

(c) Clear, manifest, demonstrable and obvious error is conclusively shown as to the facts found by the District Judge, whose findings conflict with, not only the *overwhelming quantity and quality* of the evidence, but even with *admissions* and *undisputed evidence.*

Stuart v. Hayden, 169 U. S. 1, 14, 18 S. Ct. 274, 42 L. Ed. 639;

Texas & Pac. Ry. Co. v. R. R. Comm., 232 U. S. 338, 58 L. Ed. 631, 34 S. Ct. 438;

Washington Securities Co. v. U. S., 234 U. S. 76, 58 L. Ed. 1220, 34 S. Ct. 725;

Bodkin v. Edwards, 255 U. S. 221, 65 L. Ed. 595, 41 S. Ct. 268;
T. & N. O. R. Co. v. Brotherhood, 281 U. S. 548, 74 L. Ed. 1034, 50 S. Ct. 427;
Page v. Ark. Nat. Gas Corp., 268 U. S. 269, 76 L. Ed. 1096, 52 S. Ct. 507.

The issues here do not hinge upon the sufficiency and effect of the evidence, but upon the fact of it.

Danowitz v. *U. S.,* 281 U. S. 389, 74 L. Ed. 923, 50 S. Ct. 344;
Comm'rs. v. *St. L. S. W. Ry.,* 257 U. S. 547, 66 L. Ed. 364, 42 S. Ct. 250.

(d) If the evidence in this record (R. 61 to 298) will be examined by this Court, as we submit it should, the conclusion is inescapable that (1) the District Judge's factual findings are clearly erroneous; and, (2), the peculiar handling of this case by the Circuit Court of Appeals compels the conclusion that they did not accord Petitioner that review to which he was entitled under the law and rules.

United States v. Johnson, 268 U. S. 220, 69 L. Ed. 925, 45 S. Ct. 496;
Chicago, M. & St. P. R. Co. v. Coogan, 271 U. S. 472, 70 L. Ed. 1041, 46 S. Ct. 564.

(e) Where, as here, the undisputed evidence (admission of the driver, decedent's brother, R. 110-111) showed that the automobile was driven off the paved city street and onto a parallel railroad track and embankment at a distance before reaching the standing freight car than was required to stop (also admitted, R. 110-114), it was clear error of law to hold that the presence of that car, unlighted at daybreak, was the proximate cause of the collision, which ensued only because no effort was made to stop (likewise admitted, R. 112).

(f) Both Courts below erred manifestly in ruling that, as a matter of law, the presence of an unlighted

railroad car standing upon the track, which was no part of the street, was negligence per se.

(g) Both Courts below erred grievously in holding that the railroad dirt embankment constructed alongside a paved city street, by express municipal authority and specification, and the track situated thereon, constituted a part of that street.

(h) Both Courts below erred, under those conditions, in applying thereto the statutory rule and jurisprudence of Louisiana relative to the unlawful parking of vehicles at night upon the "shoulder" of a paved public highway.

(i) Both Courts below erred in deciding that under the law of Louisiana—or the general jurisprudence—that to obstruct a public way with a railroad freight car was negligence per se.

(j) Both Courts below erred in ruling directly in conflict with local state decisions and contrary to the great weight of authority, that decedent could not legally be held guilty of contributory negligence, because he was "asleep" or "dozing" at the time.

C. Jurisdictional Statement and Reasons Relied On for Allowance of Certiorari.

Under application for certiorari the Supreme Court will examine the record and grant the writ for possible reversal after hearing, where it is disclosed thereby that:

The Supreme Court of the United States has jurisdiction in its sound discretion, to require by certiorari that a cause finally adjudicated by a Circuit Court of Appeals be certified to it for determination, with the same power and authority as if it had been brought there by unrestricted appeal.

Judicial Code, Sec. 240 (a), U. S. C. A. Title 28, Sec. 347;

U. S. Supreme Court Rule 38.

1) The evidence is *insufficient, as a matter of law,* to support the judgment a qua.

Chicago, M. & St. P. R. Co. v. *Coogan,* 271 U. S. 472, 70 L. Ed. 1041, 46 S. Ct. 564;

United States v. *Johnson,* 268 U. S. 220, 69 L. Ed. 925, 45 S. Ct. 496.

2) This record does not fall under the "concurrent findings" rule, because, in truth and in fact, *the Court of Appeals here made no findings;* nor can any Court base an approval of demonstrably erroneous findings of the District Judge upon a fair consideration of this record, under the present Rules and jurisprudence requiring a real review and not merely an application of the "scintilla of evidence" rule.

General Talking P. Corp. v. *Western Elec. Co.,* 304 U. S. 175, 546, 58 S. Ct. 849;

Southern Power Co. v. *N. C. Pub. Serv. Co.,* 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413;

U. S. v. *Johnson,* 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925;

U. S. v. *Chemical Foundation,* 272 U. S. 1, 14, 47 S. Ct. 1, 6, 71 L. Ed. 131;

U. S. v. *McGowan,* 290 U. S. 592, 54 S. Ct. 95, 78 L. Ed. 522;

Alabama Power Co. v. *Ickes,* 302 U. S. 464, 58 S. Ct. 300, 82 L. Ed. 374.

3) Where manifest and prejudicial factual errors are made clear, manifest and the alleged erroneous conclusions are conclusively demonstrated to involve not merely the sufficiency or effect of the evidence.

Stuart v. *Hayden,* 169 U. S. 1, 18 S. Ct. 274, 42 L. Ed. 639;

Townson v. *Moore,* 173 U. S. 17;
Texas & Pacific Ry. Co. v. *R. R. Comm.,* 232 U. S. 338, 34 S. Ct. 438, 58 L. Ed. 631;
Dun v. *Lumbermen's Credit Assn.,* 209 U. S. 20, 23;
Securities Co. v. *U. S.,* 234 U. S. 76, 78, 34 S. Ct. 725, 58 L. Ed. 1220;
Bodkins v. *Edwards,* 255 U. S. 221, 41 S. Ct. 268, 65 L. Ed. 595.

4) The rehearing here was not denied for reasons involving mere weight of evidence; but, after and notwithstanding application demonstrating *admitted error of law and procedure,* which should have been recognized and allowed.

Moore v. *U. S.,* 150 U. S. 57, 61, 14 S. Ct. 26, 37 L. Ed. 996;
U. S. v. *Socony etc. Co.,* 310 U. S. 150, 60 S. Ct. 811;
J. W. Bishop Co. v. *Shelhorse,* 141 Fed. 643, 648;
O'Donnell v. *N. Y. Transp. Co.,* 187 Fed. 109, 110.

5) Where the decision of the Federal Court questioned *misapplied the local law and jurisprudence,* or is contrary to the settled jurisprudence generally or the great weight of authority, both local and general.

Sup. Ct. Rule 3815 (b);
Ruhlin v. *N. Y. Life Ins. Co.,* 304 U. S. 202, 58 S. Ct. 860.

6) Where the procedure involved departed from the requirements of the established rules or the accepted and usual course of such judicial proceedings.

Ibid.

7) Where a substantial question is presented which requires supervision or settlement by the Supreme Court.

Ibid.

D. Brief in Support of Foregoing Petition for Certiorari to the United States Circuit Court of Appeals, Fifth Circuit.

I. The original ruling of the Circuit Court of Appeals, Fifth Circuit, that factual findings of a District Judge, who tried the case without a jury, "are not subject to review by this Court" was manifest error, which that Court admitted, when, after rehearing sought, it withdrew that ruling and altered the record, so as to change their ruling that same were "not clearly erroneous", which they demonstrably are.

To thus side-step a review and reconsideration and their own conclusion of the factual issues presented, was a violation of the letter, spirit and intent of Rule 52(a) of the Rules of Federal Procedure in Civil Actions and the applicable Federal Jurisprudence.

Under the old practice in the Federal Courts, the line of distinction as to the reviewability on appeal of finding of fact was between law and equity cases.

Burns Bros. v. *Cook Coal Co.*, 42 Fed. (2d) 109;

Boynton v. *Moffat Tunnel Imp. Dist.*, 57 Fed. (2d) 772 (287 U. S. 620);

Waterloo Min. Co. v. *Doe*, 27 C. C. A. 504, 8 U. S. App. 411, 82 Fed. 51;

Keller v. *Potomac Elec. Co.*, 261 U. S. 428, 67 L. Ed. 731, 43 S. Ct. 445;

Sun Co. v. *Vinton Pet. Co.*, 248 Fed. 623 (247 U. S. 514);

Faunce v. *Woods*, 5 Fed. (2d) 753;

Quality Realty Co. v. *Wabash R. R.*, 50 Fed. (2d) 1051;

Kershaw v. *Julien*, 72 Fed. (2d) 528.

It was held then that the Seventh Amendment to the Constitution the conclusions of fact by a jury could not be

reexamined on appeal except in accord with the common law, and were, therefore, binding upon the appellate court—if, only, supported by a scintilla of evidence.

Aetna Life Ins. Co. v. *Ward,* 140 U. S. 76, 35 L. Ed. 371, 11 S. Ct. 720;

N. Y. L. E. & W. R. Co. v. *Winter's Adm.,* 143 U. S. 60, 36 L. Ed. 71, 12 S. Ct. 356;

Fairmount Glass Wks. v. *Cub Fork Coal Co.,* 287 U. S. 474, 77 L. Ed. 439, 53 S. Ct. 252;

Newcomb v. *Wood,* 97 U. S. 581, 24 L. Ed. 1085;

John Irving Shoe Co. v. *Dugan,* 93 Fed. (2d) 711;

Ganghan v. *Mich. Int. Motor Frt.,* 94 Fed. (2d) 266.

When the Seventh Amendment was adopted there was, of course, no union of law and equity, and the common law forms of action prevailed and determined, largely, the right to a jury. Because of the coalescing of law and equity in 1912, those distinctions passed. Prior thereto, however, even in law actions in which no right to jury trial existed, or in which waived, the factual findings or conclusions of the trial court had the same effect as a jury verdict.

State Farm, Etc. Co. v. *Coughran,* 58 S. Ct. 670;

Lee Hardware Co. v. *U. S.,* 25 Fed. (2d) 42.

Following the abolition of the distinction between law and equity, the distinction now in effect, as to review on appeal of the factual findings of the district court, hinges solely upon whether the action was tried before a jury or by the court without a jury—irrespective of whether the jury was waived or the cause was of such a character—and whether, in truth, such findings are "clearly erroneous".

Blume, "Review of Facts in Non-Jury Cases", 20 J. Am. Jud. Soc. 68, 130-131;

Clark, "Review of Facts Under Proposed Fed. Rules", 20 J. Am. Jud. Soc. 129;

Clarks & Stone, "Review of Findings of Fact", 4 U. Chi. L. Rev. 190;

U. S. v. *Esnault-Pelterie*, 58 S. Ct. 412 (Distinction as to Court of Claims).

Professor Moore, in his work on Federal Practice under the New Rules of Civil Procedure, has this to say on this point:

Moore's Fed. Prac., Vol. 3, Ch. 52.01, p. 3118.

> "* * * Feeling that *the function of the appellate courts was to promote justice on the facts of particular cases as well as to establish general uniformity in law*, the fuller equity review of both law and fact was established for all non-jury actions. But as indicated by the wording of the Rule, the lower court's findings, because of the court's proximity to the trial and the opportunity afforded thereby to judge the credibility of witnesses, are to control unless clearly erroneous. * * * In action tried to a jury as of right, the common law type of review, safeguarded by the Seventh Amendment, continues."

Rule 52(a) of the New Rules of Civil Procedure specifically authorizes the Circuit Court of Appeals on review to set aside clearly erroneous findings of fact by the trial Judge:

> "In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * * Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The "Committee Notes" on the drafting of the new rules say (3 Moore, p. 3116):

> "* * * The provisions of U. S. C., Title 28, §§ 773 (Trial of issues of fact; by court) and 875 (Review in cases tried without a jury) are superseded in so far as they provide a different method of finding facts and a different method of appellate review. The rule stated in the third sentence of Subdivision (a) accords with the decisions on the scope of the review in modern federal equity practice. *It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony.* See Silver King Coalition Mines Co. *v.* Silver King Consolidated Mining Co., 204 Fed. 166 (C. C. A. 8th, 1913), cert. den. 229 U. S. 624 (1913); Warren *v.* Keep, 155 U. S. 265 (1894); Furrer *v.* Ferris, 145 U. S. 132 (1892); Tilghman *v.* Proctor, 125 U. S. 136, 149 (1888); Kimberly *v.* Arms, 129 U. S. 512, 524 (1889). Compare Kaeser & Blair Inc. *v.* Merchants' Ass'n., 64 F. (2d) 575, 576 (C. C. A. 6th, 1933); Dunn *v.* Trefry, 260 Fed. 147, 148 (C. C. A. 1st, 1919)."

Petitioner, therefore, asserts with emphasis, though with every deference, respect and regard, that when The Circuit Court of Appeals ruled in their opinion of April 29th, 1942, that:

> "* * * Defense witnesses offered contradictory testimony, but the conflict was resolved in favor of the appellees by the trial court, and *its findings thereon are not subject to review* by this court."

that decision is clearly and beyond question erroneous.

We, therefore, earnestly submit that *we are entitled to have the facts of this record reviewed*, the evidence considered, evalued as to quality and quantity and, if, as we confidently represent, the facts found by the District Judge are

"clearly erroneous", petitioner is entitled, under the law, to a review and reversal thereof.

Such has been the recent, oft-repeated and universally held decision by courts of many jurisdictions prior to and especially under New Rule 52(a). Petitioner realizes that much deference is due under the rule to the findings of the trial Judge, but *where his finding is clearly erroneous in that it is either wholly unsupported or contrary to the preponderant quality and quantity of the evidence, it is the duty of the Appellate Court to reverse or revise same*— as a matter of law.

Aetna Life Ins. Co. v. *Kepler,* 116 Fed. (2d) 1, C. C. A. 8th Cir. 1941.

> "The effect of Rule 52(a) was to establish a uniform standard for testing the validity of findings of fact in any case tried without a jury. The standard adopted was that which had always prevailed in equity.[6]

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[6] "State Farm Mutual Automobile Ins. Co. v. Bonacci, 8 Cir., 111 F. 2d 412, 415; Vol. 3, Moore's Federal Practice, p. 3115, et seq.; Simkins' Federal Practice, 3d Ed., p. 488. The Advisory Committee which assisted in drafting the new rules had this to say of the above quoted portion of Rule 52(a):

'The rule stated in the third sentence of Subdivision (a) accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony.' • • •

Honorable William D. Mitchell, Chairman of the Advisory Committee, on October 27, 1938, in a lecture on the new rules said, with reference to this rule: 'In subdivision (a) we find a very important rule. • • • Under the former federal system, a statute provided that where a jury is waived the findings of the court have the effect of a verdict and may not be set aside if there is substantial evidence to support them, whereas in equity practice the findings of a trial judge could be set aside on an appeal if clearly erroneous, due regard being given to the opportunity of the trial judge to pass on the credibility of the witnesses. You had these two different rules under the old system. When uniting law and equity procedure it is desirable to have one rule applicable to all cases

"This Court, with respect to jury-waived cases, is no longer merely a court of error which considers only questions of law. It now acts as a court of review in all non-jury cases in accordance with the practice which formerly prevailed in equity appeals.

"The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, are not binding upon this court."

United States v. Iovacchini Bros., 116 Fed. (2d) 345, C. C. A. 3rd Cir. 1940.

"We deem it necessary to state at the outset that material findings of fact expressed by the trial judge are not supported by the evidence. * * * It seems to us that this shows just the opposite of what the trial judge concluded from it.

"The judgment of the court below is reversed and the cause is remanded with directions to enter judgment for the plaintiff in the sum demanded with interest."

Kuhn v. Princess Lida, 119 Fed. (2d) 704, C. C. A. 3rd Cir. 1941.

"* * * The sufficiency of the evidence to sustain a trial court's conclusion or finding of an ultimate fact remains appropriate matter for an appellate court's consideration. State Farm Mutual Automobile Insurance Co. v. Bonacci, et al., 8 Cir., 111 F. 2d 412, 415, * * * An incorrect conclusion by a trial court qualifies as a 'clearly erroneous' finding, for the

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tried on the facts by a judge, so as to avoid preserving the distinction between law and equity cases, * * * so now when a case is tried on the facts by a judge it makes no difference whether the case is one formerly cognizable at law or in equity. His findings have the same weight in both types of actions and can be set aside if clearly erroneous. They can be set aside if against the clear weight of evidence, even though there is some evidence that might support a verdict or findings in a law case under the old system.' (Rules of Civil Procedure, Annotated, Appendix, page 199.)"

correction whereon on appeal Rule 52(a) specifically provides."

Beckley Nat. Bank v. Boone, 115 Fed. (2d) 513, C. C. A. 4th Cir. 1940.

"* * * The review in this court is a real review and not a perfunctory approval. Crawford v. Neal, 144 U. S. 585, 12 S. Ct. 759, 36 L. Ed. 552; Furrer v. Ferris, 145 U. S. 132, 12 S. Ct. 821, 36 L. Ed. 649; National Manufacture & Store Corp. v. Whitman, 4 Cir., 93 F. 2d 829; see also, Hoeltke v. C. M. Kemp Mfg. Co., 4 Cir., 80 F. 2d 912, and Standard Acc. Ins. Co. v. Simpson, 4 Cir., 64 F. 2d 583. See also, 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. * * *"

Campana Corporation v. Harrison, 114 Fed. (2d) 513, C. C. A. 7th Cir. 1940.

"* * * Of course Federal Rule 52 does not require us to accept fact findings unsupported by the evidence. Nor does this Rule require us to respect conclusions of law which do not rest properly on the facts so found. * * * Whether special findings are supported by the evidence or whether they give the requisite support to conclusions rendered thereon, are questions open to consideration here."

Fleming v. Palmer, 123 Fed. (2d) 749, C. C. A. 1st Cir. 1941.

"* * * A finding of fact is clearly erroneous if it is against the clear weight of the evidence. It does not suffice that it be supported by evidence. * * * State Farm Mutual Automobile Ins. Co. v. Bonacci, 8 Cir., 1940, 111 F. 2d 412; Manning v. Gagne, 1 Cir., 1939, 108 F. 2d 718; * * * The American Bar Institute Proceedings, p. 316, et seq. (Cleveland, 1938); * * *"

Equitable Life Assur. Soc. v. Irelan, 123 Fed. (2d) 462, C. C. A. 9th Cir. 1941.

"* * * This court is in as good a position as the trial court was to appraise the evidence and we have

the burden of doing that. Rule 52(a) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, was intended to accord with the decisions on the scope of the review in federal equity practice; and, as is well known, in the federal courts where the testimony in equity or admiralty cases is by deposition the reviewing court gives slight weight to the findings."[7]

State Farm Mut., etc., Co. v. Bonacci, 111 Fed. (2d) 412, C. C. A. 8th Cir. 1940.

"The rule plainly contemplates a review by the appellate court of the sufficiency of the evidence to sustain the findings. If this were not true, the provision that requests for findings are not necessary 'for the purpose of review' would be meaningless. If the findings are clearly erroneous, the appellate court should set them aside, always giving due regard to the fact that the trial court had the opportunity of observing the witnesses. In Simpkins Federal Practice, 3d Ed., page 488, in commenting on the effect of Rule 52(a), it is said:

" 'The new practice, now incorporated in the Civil Procedure Rules, accords with the decisions on the scope of the review in modern Federal equity practice, and applies to all cases tried without a jury, whether legal or equitable in character, and whether the finding is of a fact concerning which the testimony was conflicting or of a fact inferred from uncontradicted testimony.

" 'Under the new practice, where findings are made by the court without a jury, the appellate court is not limited to the mere question whether there is any substantial evidence to support them, but may set them aside if against the clear weight of the evidence, at the same time giving full effect to the special qualification of the trial judge to pass on credibility.'

[7] If the deposition of Miss Billy Lee be disregarded, the overwhelming burden of the evidence is doubled because there remains only the self-serving, prejudiced, and inconsistent evidence of the driver, decedent's brother, who repudiates his own admissions. See also: Himmel Bros. Co. v. Serrick Corp., 122 F. (2d) 740, C. C. A. 7th Cir. 1941.

> "The rule with reference to review of findings of fact in equity cases has often been announced by this Court. Johnson v. Umsted, 8 Cir., 64 F. 2d 316; Koenig v. Oswald, 8 Cir., 82 F. 2d 85; Lambert Lbr. Co. v. Jones Engineering & Constr. Co., 8 Cir., 47 F. 2d 74; Chicago, M., St. P. & P. R. Co., v. Flanders, 8 Cir., 56 F. 2d 114; First National Bank v. Andresen, 8 Cir., 57 F. 2d 17; United States v. Perry, 8 Cir., 55 F. 2d 819. * * *"

A legion of authority could be cited.[8] We deem the foregoing amply illustrative.

It is not our function to explain or account for the erroneous impressions of the Honorable District Judge. But when he preferred to credit the vague, unreasonable and inconsistent, dissolute and interested brother of decedent, who repudiated his own admissions, and their night-club waitress friend, as against the positive and clear cut testimony of their own doctor, a man of high standing, the Clerk of Court and his son and two policemen—all disinterested outsiders (pretermitting the plausibilities, etc.), for the Circuit Court to say that they are bound thereby and such findings "are not subject to review" is to deprive Petitioner of any relief from unreasonable, demonstrably unsound and unsupported conclusions of a District Judge. *That makes an appeal an empty gesture, in effect, enforces and perpetuates the old, harsh, "scintilla-of-evidence" rule of the old law courts, vests the factual findings of a District Court with the sanctity of a jury's verdict, renders meaningless and ineffective the language and intent of Rule 52(a)* of the New Rules of Civil Procedure; and, likewise, when, without any consideration or discussion of the evidence, the Circuit Court perpetuates that gross injustice and side-steps the review the law contemplates by a mere

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[8] Moore's Fed. Prac. 1941 Supp. Vol. 3, p. 76; Fed. Rules Service, 52 A. 42.

"not clearly erroneous" generalization, it *deprived Petitioner of any review* upon the factual issues, properly presented, which were demonstrably erroneous.

This petition for certiorari, therefore, does not present the effort of an unsuccessful litigant, seeking a factual review by the Supreme Court. What we seek, what the law grants us, what we are justly, fairly and equitably entitled to and all that we ask is that review of the facts which Rule 52(a) and the law grants us on appeal and which obviously was not granted to us by the Court of Appeals and which, therefore, we can obtain only by this Court or by its direction thereasto to the Court of Appeals after reversal here of its erroneous action herein.

II. The Court of Appeals court document, which we have herein referred to as the "opinion" dated April 29th, 1942, was, as well, *a formal decree,* wherein the judgment of the District Court was affirmed.

In accordance with Rule 28 of the Fifth Circuit that opinion and decree was on that date *formally filed and entered.* There exists no court rule of that Circuit, authorizing or warranting that court, thereafter, to alter, amend or change that opinion or decree, thereafter, and especially after rehearing sought; nor is there any statute, law or jurisprudence authorizing or empowering that court to, then, and without granting rehearing, make substantial or material, as distinguished from defects of form, amendments in such a filed and formally entered decree.

Petitioner, therefore, submits that, under those circumstances, the action of the Court of Appeals for the Fifth Circuit in so doing herein constitutes *plain and manifest error.*

If any Court of Record is permitted, without allowing a rehearing sought by an application which discloses manifest and admitted error as to a material and substantive

ruling in its opinion and decree and after formal filing and entry thereof, to change, alter and amend the same, by not only striking out the error therein but *actually eradicating same by pasting thereover the record a revision thereof,* then that record is thereby substantially altered and a litigant is thereby deprived of substantial right.

In the instant case were it not that petitioner had ordered, paid for and been furnished by the Clerk with a certified copy of said erroneous original opinion and decree, this Record would not have disclosed that manifest and admitted error thus, in effect, eradicated from the Court Record. The order of May 30th, 1942, directing that "amendment" (R. 447) directs merely the insertion of the new phraseology but does not disclose the erroneous ruling ordered and physically stricken via such "amendment".

R. S. Section 954, 1 Stat. 91 (U. S. C. A. Vo. 28, Sec. 777) authorizes Federal Courts to make amendments as to matters of form only. It was designed and has been uniformly to prevent hardship and injustice—not, as here, to accomplish or effect them.[9]

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[9] Eberly v. Moore (Tex. 1861) 24 How. 149, 16 L. Ed. 612; Parks v. Turner (La. 1851) 12 How. 39, 47, 13 L. Ed. 883; Less v. English (Ark. 1898) 85 F. 471, 476, 29 C. C. A. 275; In re Royce Dry Goods Co. (D. C. Mo. 1904) 133 F. 100; Portland Gold Mining Co. v. Stratton's Independence, 196 F. 714; 211 F. 1022; Walden v. Craig, 14 Pet. 147, 154, 10 L. Ed. 393; Stockton v. Bishop, 4 How. 155, 167, 11 L. Ed. 918; Hodges v. Kimball, 91 F. 845, 34 C. C. A. 103; Romaine v. Union Ins. Co., 28 F. 625, 626; Davis v. Kansas City, S. & M. R. Co., 32 F. 863; Healey Ice Mach. Co. v. Green, 184 F. 515, 191 F. 1004, 111 C. C. A. 668; Northrop v. Mercantile Trust, etc., Co., 119 F. 969; Tensas Basin Levee Dist. v. Tensas Delta Land Co., 204 F. 736, 123 C. C. A. 40; N. & G. Taylor Co. v. Anderson, 48 S. Ct. 144, 72 L. Ed. —; Quaker City Cab Co. v. Fixter, 4 F. (2d) 327; McDonald v. Nebraska, 101 F. 171, 41 C. C. A. 278; In re Griggs, 233 F. 243, 147 C. C. A. 249; Gagnon v. U. S. 193 U. S. 451, 24 S. Ct. 510, 48 L. Ed. 745; Phillips & C. Const. Co. v. Seymour, 91 U. S. 646, 656, 23 L. Ed. 341; Teal v. Walker, 4 S. Ct. 420, 422, 111 U. S. 242, 28 L. Ed. 415; Mitsui v. St. Paul Fire & Marine Ins. Co., 202 F. 26, 231 U. S. 749; In re Haskell, 73 F. (2d) 879; Concordia Ins. Co. of Milwaukee v. School Dist. No. 98 of Payne County, Okl., 40 F. (2d) 379; 282 U. S. 545; Massachusetts Bonding & Ins. Co. v. Concrete Steel Bridge Co., 37 F. (2d) 695; McAllister v. Sloan, 81 F. (2d) 707.

It has been long held that after entry of judgment only clerical, typographical and formal amendments are proper.[10]

Nor was this amendment any mere correction to conform to the decree, harmless mistake or informal correction noted or sought by a litigant. Having made a material and grievous error upon a matter of substance in ruling wrongly upon a matter of law and procedure, entitling petitioner to a rehearing, the Court of Appeals, after rehearing applied for, eradicated its error from the record and, then, refused the rehearing.

R. S., Section 726, Jud. Code, Section 269, U. S. C. A., Section 391, provides that upon appeal or certiorari, the court may disregard "technical errors, defects or exceptions which do not affect the substantial rights of the parties." The affirmative should be and is pregnant with the negative. New Rule 61 specifically provides that harmless error may be disregarded. But, there, the error was material, substantive, potent and highly prejudicial. Petitioner was entitled to a serious and thorough review of the assigned and presented palpable errors of both law and fact. He obtained neither; the Circuit Court having first said such review was beyond its jurisdiction, then, when that error was properly noted, *it eradicated its mistake from the record and, without stating any reason,* presenting any factual discussion and perpetuating, *without an authority cited,* the erroneous legal conclusions complained

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[10] Albers v. Whitney, Fed. Cas. No. 137; U. S. v. One Hundred and Sixty-Three, etc., Barrels of Whiskey, Fed. Cas. No. 15,937; Gagnon v. U. S., 24 S. Ct. 510, 511, 193 U. S. 451, 48 L. Ed. 745; Brush v. Robbins, Fed. Cas. No. 2,059; Bank of Kentucky v. Wistar, 3 Pet. 431, 432, 7 L. Ed. 731; Fidelity Ins., Trust & Safe Deposit Co. v. Roanoke Iron Co., 84 F. 744; U. S. v. Chicago & A. R. Co., 250 F. 101; City of Manning v. German Ins. Co., 107 F. 52; Bernard v. Abel, 156 F. 649; United Zinc & Chemical Co. v. Britt, 264 F. 785; 258 U. S. 268; Kennedy v. Bank of Georgia, 8 How. 586, 610, 12 L. Ed. 1209; Warren v. Moody, 9 F. 673; Wilhite v. Skelton, 149 F. 67, 78 C. C. A. 635; Jackson v. Ashton, 10 Pet. 480, 481, 9 L. Ed. 502; U. S. v. Van Dusen, 78 F. (2d) 121; Maryland Casualty Co. v. Cox, 104 F. 2d 354.

of, rejected the rehearing with a platitudinous assertion in the language of the rule but in violation of its scope, meaning and intent—thereby perpetuating the manifest errors and serious injustices appealed from.

III. The Circuit Court's opinion of April 29th, 1942, holds, as did the District Court, that the railroad was negligent in permitting a freight car to stand upon its track, alongside a paved city street at night (which track had been constructed by specific municipal authority upon its own ramp or dump built for the purpose according to municipal specification) "without taking precautions to warn the public of its presence"—a light. Further, that the results of so doing are to be tested and governed by the legal principles applicable to "parking an unlighted vehicle upon or adjacent to a highway at night."

In so ruling, three manifest errors were indulged:

1) In ruling and holding that it is, under the law of Louisiana, negligence per se for a railroad, in the use of its authorized track, to obstruct a public road, street or highway with an unlighted box car.

2) That the railroad car was "parked" on any portion of the street (The erroneous concept being that the railroad embankment was the "shoulder" of a highway).

3) That the same legal principles of negligence are properly applicable to the stated facts, even if established by the evidence.

While the effort is constant by damage suit plaintiffs to apply to railroads the "highway jurisprudence" evolved from the operation of automobiles, nowhere in the jurisprudence of Louisiana will any such authority be found. On the contrary, the law of Louisiana as to the "parking" of vehicles upon the highway and obstructing the highway is utterly inapplicable to the placement of railroad cars

upon its tracks or even the obstruction of highways by railroad cars.

(a) Obstructing highways by parked "vehicles" is regulated by specific statute, not applicable to railroad cars, for which there is an altogether different rule:

Dart's Gen. Stats., Sec. 5220, 5222.

(b) The jurisprudence of Louisiana regarding the two situations varies vastly:

Parked "vehicles" obstructing highways in violation of statutory prescription is held negligence per se:

Gamble v. *Wilson & Co.*, 171 So. 138;
Horn v. *Barras*, 172 So. 451;
Roziano v. *Trauth*, 131 So. 212;
Bondreau v. *Iseringhausen*, 177 So. 412;
Hudson v. *Provensano*, 149 So. 240.

Whereas, *under neither the law of Louisiana or the general law of torts, is it negligence for a railroad to obstruct the public highway even with an unlighted railroad car*, if done under legal authority—as here—and in the absence of unusual adverse weather or other conditions—not here existing.

General Rule: *99 A. L. R.* 1455, citing numerous decisions;
Plummer v. *G. M. & N. R. Co.*, 153 So. 322;
Jones v. *T. & P. R. Co.*, 154 So. 768;
Sweeny v. *Mo. Pac. R. R.*, 149 So. 147;
Squyres v. *Baldwin*, 191 La. 249, 181 So. 584, 185 So. 14.

Specifically under the City Ordinance here (R. 291-297), petitioner was *authorized, not only to construct* its track with the "center line thereof four feet (4') west of the west edge of pavement slab", and according to detailed *specifications prescribed by the ordinance*, but the Railroad

was thereby *authorized to operate upon said tracks* and use same "*by usual and customary railroad train operations* thereon, thereover and in connection therewith," and was required "to serve the industries now located and to be located" along said street.

How then, can it be possibly held that in so doing the railroad was negligent per se? Of what possible connection or relevancy has the "highway" rule that to illegally park a vehicle so as to obstruct traffic constitutes negligence?

(c) Further, that ordinance requires the railroad to "construct" alongside that street an "embankment extending eight and one-half (8½′) feet west of the center line of track, with sufficient slope to support track", etc. (R. 294). In other words, *the railroad track was not placed on the street but upon an embankment constructed for it alongside the street.* Is it not really absurd to contend and manifest error to hold that that railroad embankment constitutes a "shoulder" of the highway or street?

According to the Ordinance, the only evidence in this record thereasto, Front Street is thirty-four (34′) feet wide; the railroad was authorized to construct an embankment for its tracks parallel to the street along the lake front, of specified size. There is no factual finding or record evidence to sustain the holding that the railroad embankment is, as Counsel contends a part of the street. Even Counsel merely contended it a "shoulder" of a "highway" because that city street was designated as part of a through route!

In any event, the situation necessarily resolves itself into a *partial obstruction, which is not unlawful and does not constitute negligence under the law of Louisiana and,* here, had no proximately causal connection with the wanton carelessness of the driver and occupants of this automobile, who never saw it at all and recklessly drove off the high-

way—not because of it—and at a distance from it more than ample to stop or turn back or slow down before coming into collision with it.

We, therefore, respectfully submit, that, here, irrespective of disputed facts, there is clear error in application of the law of Louisiana, even to the unsupported factual findings of the District Judge.

IV. After erroneously so finding Petitioner to be negligent, in so placing his freight car upon his track, alongside the paved street, the April 29th, 1942 opinion erroneously holds that therein "Appellant was guilty of negligence but for which the accident would not have occurred"—in other words, that *the absence of a light upon such car was the proximate cause of this accident.*

In so ruling, the Circuit Court erroneously and improperly ignored the *positive, uncontradicted testimony of the driver of the automobile himself (decedent's brother), that the presence of the unlighted freight car had nothing to do with his driving off the highway* 150 feet before reaching it (R. 110-111); the repeated admission of the driver that he ran off the pavement *because his brother grabbed the wheel* (R. 106); that *he could have stopped his automobile within 20 feet,* after running off the pavement and onto the railroad track (R. 110, 112, 114); that, instead, *he did not apply his brakes, reduce his speed or make any effort to stop* until he was within 10 feet of the freight car, when he first saw it and became aware of its presence (R. 112), which conduct on his part is, obviously, *the sole proximate cause;* which, at the time of the trial, he *blamed solely upon the blinding lights of an approaching automobile.*

What do the Courts of Louisiana say is the duty of the "blinded" driver of a moving automobile? The same as all other courts: *To Stop,* which this driver admits he had

ample facilities (brakes) and opportunity (time, space) to do; but which he made no effort to do until it became impossible.

The universal rule is that even if his car remains on the road, it is his duty to stop immediately—all the more so if he runs off the road, where obstructions are the more likely.

Berry, Automobiles, Vol. 2, Sec. 2460, pp. 540-544 (cases cited);
Krousel v. *Thieme,* 128 So. 670, 672;
Meredith v. *Kidd,* 147 So. 539;
Pepper v. *Walsworth,* 6 La. App. 610;
Woodley v. *Schusters' Produce, Inc.,* 170 La. 527, 128 So. 469 (La. S. Ct.).

The principle of law is so well settled in Louisiana as to be now elementary.[11]

V. The Circuit Court, in the April 29th, 1942 decision, erroneously held that "under the findings made by the trial court, no contributory negligence could be imputed to the decedent"—because not himself intoxicated or accompanying an intoxicated driver and himself asleep at the time.

This obvious error is consequent upon the erroneous factual finding of the District Judge that neither decedent nor driver were intoxicated and only the driver had drunk but one bottle of beer, in the face of the *overwhelming proof to the contrary,* including the repeated admission to the contrary at the time and on the following day by the driver, decedent's brother.

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[11] Futch v. Addison, 126 So. 590; Safety Tire Service, Inc. v. Murow, 140 So. 879; Kern v. Knight, 127 So. 133; Williams v. Campbell, 185 So. 683; Mansur v. Abraham, 164 So. 418; Rector v. Allied Van Lines, 198 So. 516; Meaux v. Gulf Ins. Co., 182 So. 158, 164; Butler v. Miss. F. Co., 175 So. 887; Horn v. Barras, 172 So. 451; Maggio v. Bradford Express, 171 So. 859; Goodwin v. Theriot, 165 So. 342.

No possible sudden emergency theory could result from finding a railroad car upon a railroad track'.

Ignoring the improbability of two middle-aged men and a young night-club waitress spending an entire night visiting three "beer joints" in three towns of two states without drink; the facetious testimony of the waitress (R. 278); the evidence about their drunkenness and the fatal and repeated admissions of the driver that his brother had grabbed the wheel, which caused them to leave the pavement (R. 92, 93, 95, 96, 100, 101-102, 121-122, 189-190; 195-196); with that vague, indefinite and inconsistent testimony is contrasted the positive contrary testimony of such witnesses as Dr. Moss (R. 178-179), the Clerk of the Court, Mr. Gill (R. 189-196), and his son (R. 195), and the two policemen (R. 204-223); and how can a finding that no one but the driver drank anything, and he only one bottle of beer, be anything but "clearly erroneous" as contemplated by Rule 52(a)?

But, even if the driver were the only one drinking, it is the law of Louisiana that one voluntarily entering that vehicle is himself negligent, although asleep at the time of the subsequent accident.

Clinton v. *City of West Monroe*, 187 So. 561.

VI. It is the law of Louisiana, which here is fatal against Respondents, if the proper recognition be given to the conclusive proofs of this record upon intoxication, that decedent, even if himself sober, was grossly negligent in entering an automobile under such conditions; further, that the fact that at the time of the accident decedent was asleep affords no excuse, justification or mitigation of that negligence, which, under the Louisiana law, constitutes contributory negligence and a complete bar to any recovery on account thereof. *No imputation of the driver's negligence is involved.*

4 Blashfield Cyc. Automobile Law, Sec. 2432, p. 232;
Livaudais v. *Black*, 127 So. 129;
Richard v. *Canning*, 158 So. 598;

Whitsett v. *Morton*, 33 Pac. (2d) 54;
Weedle v. *Phelan*, 177 So. 407;
House v. *Schmelzer*, 40 Pac. (2d) 577;
Hicks v. *Herbert*, 113 S. W. (2d) 1197;
Clinton v. *City of West Monroe*, 187 So. 561.

Under this status of the law, is it not manifest injustice and apparent error to deprive Petitioner of any finding on Review upon the question of intoxication of the driver? The intoxication of the decedent is immaterial as is his sleeping; the soberer he was the greater his negligence, and if himself drunk, he was, under the law of Louisiana, guilty of contributory negligence in driving in an automobile being recklessly operated by one under the influence of liquor.

Not only is this evidence overwhelming that this driver was drunk, but the only outside disinterested eye witness of the operation of that automobile, who stood watching the entire episode, is that the speed was excessive, the driver drunk and the automobile ran off the highway long before reaching it and headlong into the end of the box car (R. 220-223).

We respectfully submit that an appeal becomes meaningless and fruitless unless one can thereby obtain the review and consideration of the clear and manifest errors of both law and fact of the Trial Judge—a right to which, we respectfully submit, the law entitles us.

Respectfully submitted,

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